REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 497 of 2004

ASSUMPTION SISTERS OF NAIROBI REGISTERED TRUSTEE........ APPLICANT

VERSUS

STANDARD KEBATHI & ANOTHER...RESPONDENT

JUDGMENT

The Applicant has come to this Court by way of an originating summons dated 14th May 2004 and filed the same date supported by an affidavit sworn by Sister Teresa Gachambi also sworn and filed the same date of 14th May 2004. The Applicant is described as Assumption of Nairobi Registered Trustee, whereas the Respondents who are two are described as Stanley Kabethei the Arbitrator and one David Kungu Gichuki t/a Complan Consulting Architects. A total of 6 prayers are sought, these are:-

(1) Whether in the absence of a written agreement between the applicant and the second respondent has jurisdiction to entertain this arbitration.

(2) Whether there was priority of contract between the applicant and the second respondent.

(3) Whether the applicant being a body corporate duly registered and with a common seal and registered trustees had duly authorized one SR. Dr. Prisca Wagura to represent them in any way in the subject matter hereto.

(4) Whether in the right of what is stated herein fore, there is any claim before the arbitration envisaged under the provisions of the Arbitration Act, 1995.

(5) Whether the applicant is entitled to such further orders/or directions as would entitle it to a fair and just determination.

(6) Whether the applicant is entitled to an award for costs in respect of these proceedings, she raised a preliminary objection to lack of jurisdiction, lack of priority of contract and misjoinder of parties.

Simultaneously with the filing of the originating summons the applicant filed an interim chamber summons under Sections 17(6) and (7) of the Arbitration Act l995. It is also dated 14th May 2004 and filed the same 14th May 2004. It is anchored on the grounds in the body of the application, as well as grounds in a supporting and further affidavits sworn by Counsel on record for the applicant as well as annextures thereto. The application sought 2 prayers namely:-

(1) That the Arbitration proceedings in the matter of a dispute between Daniel Kungu Gichuki t/a Complan Consulting Architects and Assumption Sisters of Nairobi Registered Trustees be stayed until the hearing and the determination of this suit.

(2) That costs of the application be provided for.

A perusal of the record, reveals that the first Respondent Stanley Kabethi Arbitrator entered appearance thro ugh Counsel dated 10th June 2004 and filed on 11th June 2004, simultaneously with a replying affidavit to the originating summons sworn by him on the same 11th June.

The Second respondent Daniel Kungu Gichuki, t/a Complan Consulting Architects, on the other hand entered appearance also dated 10th June 2004 and filed the same date, simultaneously with a replying affidavit also sworn by him on the same 10th June 2004 and filed the same 10th June 2004. Along side these, were grounds of opposition also dated 10th June 2004 and filed the same date, but which were discarded as will be shown later on herein, because the law allows a litigant to file either grounds of opposition or replying affidavit. The second respondent opted for the replying affidavit because of its explanatory content and annextures annexed to it.

It is further noted form the record that the first Respondent raised a preliminary objection to the interim application dated and filed on 14th May 2004 which had sought an interim order to stay the arbitration proceedings pending the hearing and determination of the originating summons. The same was supported by the second by the second respondent. It was argued inter parties and it gave rise to the ruling delivered by Aluoch J. as she then was (now JA) of 17th September, 2004. At page 4 of the said ruling the learned judge observed thus:-

"***it is my considered opinion that the issues raised both in the preliminary objection and the chamber summons are issues which can be dealt with at the trial of the originating summons. I say this because some of the written submissions prepared for preliminary objection, touch on the originating summons. In the circumstances I decline to consider the application filed and direct the parties to take directions on a date to be taken at the Registry so that the originating summons can be heard and determined on merit".***

On 27.09.05 directions were taken before Kubo J. along the following lines:-

(1) As the parties are agreed that the originating summons proceeds on the basis of affidavit evidence it is so ordered.

(2) Hearing dates for the originating summons dated 14.05.04 to be taken at the Registry. Hearing in Nairobi for one day in the morning".

The record further bears an order made on 21.3.2006 dismissing the originating summons for want of prosecution. The orders were made by Visram J. The originating summons was however reinstated by the same Visram J. vide a ruling delivered by his Lordship on the 27th day of April 2000. The reasons for reinstatement are found at page 7 lien 1 from the top where it is observed thus:-

"***I am justified that the applicant has not lined triable issues in its originating summons, that should be heard and determined before the trial court, and in that respect I exercise my discretion in favour of the applicant and allow the application dated 22nd march 2006".***

It is on the basis of that reinstatement that trial commenced on 27.07.07 by way of oral representations in court. These oral representations are anchored on the deponements filed in court by each party.

Those for the applicant are found in the affidavit in support of the originating summons sworn by Sr. Terasa Gachambi on 14th May 2004 and filed the same date. It is a brief affidavit. The salient features of

the same are:-

(i) That the applicant is corporate body duly registered under chapter 286 of the laws of Kenya.

(ii) That the 2nd respondent commenced arbitration proceedings against the applicant in April, 2003 claiming an amount of 2,371,482.70 for alleged professional services.

(iii) The applicant hired service of Counsel who then filed a defence to the said claim, before the arbitrator and upon appearing before the arbitrator, the applicant raised a preliminary objection as regards lack of jurisdiction, lack of privity of contract and misjoinder of parties.

(iv) The said proceedings were being conducted by the first respondent as the sole arbitrator, which 1st respondent over ruled the applicants preliminary objection.

(v) Upon being so overruled on the preliminary objection the applicant became aggrieved by the said ruling hence the filing of these proceedings because:-

(a) There being no arbitration agreement between the parties to the arbitration as envisaged under the Arbitration Act 1995, the first respondent lacked jurisdiction to hear and determine the matter hereto.

(b) That the purported letters giving the 2nd Respondent the brief were never issued nor executed by the applicant under its authorized trustees in law.

(c) That there is no privity of contract or at all between the applicant and the 2nd Respondent.

The first Respondents replying affidavits was sworn by the said 1st respondent on 11th June 2004 and filed on the same date. The salient features of the same are as follows:-

(a)That he was duly appointed by the chairman of the Architectural Association of Kenya (AAK) pursuant to powers conferred upon the chairman under clause A.7 “arbitration” of the Forth schedule of the Architects and quantity surveyors Act Cap.525 of the Laws of Kenya.

(b) Upon receipt of the letter appointing him an arbitrator, the first respondent duly wrote to the parties vide a letter dated 4th march 2003 informing them of his acceptance of the appointment as the sole arbitrator in this matter.

(c) That he heard oral and written submissions by the claimant on the issue of his jurisdiction and he came to the conclusion and made findings that he had jurisdiction to argue and determine the matter, that there was privity of contract and that there was no misjoinder of the parties.

(d) The basis for his holding as he did in number © above was based on information gathered by him from correspondences exchanged between the claimant and the respondent and also had regard to the provisions of clause A7 “arbitration” of the fourth schedule of Cap.525 of the Laws of Kenya.

(e)That him as the arbitrator is not supposed to be drawn into the dispute between the claimant and the respondent and as such he has been misjoined to these proceedings and as such he has no interest in the subject matter of the dispute and for that reason this court, should move to strike out this name from the proceedings.

The second Respondents affidavit is sworn by the said second respondent/David Kungu Gichuki on 10th June 2004 and filed the same date of 10th June 2004. The salient features of the same are:-

(1) He is a consulting architect and carrying on the business of an Architect within the Architect and quantify surveyors Act Cap.525 Laws of Kenya.

(2) He recalls that in the month of October 1999 one S.R. Prisca M. Wagura and SR. Mwikali Kivundiyo whom the 2nd respondent believes to be members of the applicant, approached him with a view to having him the respondent , to prepare plans for a proposed building project, the applicants were to put up for girls comprising:-

- a boarding secondary school

- a vocational training centre

(3) The project was to be undertaken for the benefit of the community in 0100itikoshi area off Kiserian Isinya Road Kajiado.

(4) The 2nd respondent duly prepared a schedule to guide the accommodation works, followed by a draft letter done by the 2nd respondent for the said two representatives to copy and officially commission the 2nd respondent over which, him second respondent had no control over, the manner of designing and framing of the commissioning letter, or their decision to commission him, the 2nd respondent as the project Architect.

(5) Thereafter the said 2nd Respondent received a commissioned paper of St. martin Depones Vocational Training Kiserian signed by S.R. Priscah M. Wagura which according to the 2nd respondent differs from the one exhibited by the applicant.

(6) Him 2nd Respondent accepted the commission vide his letter of 15th February 2000 and on this account and among others him the send Respondent believed from that:-

- The applicant Assumption Sisters of Nairobi Registered trustees were and are still the same persons as the Assumption Sisters of Nairobi". In an abbreviated form with whom he dealt.

- That it is the applicants who were the facilitators, organizers and sponsors of the project as well as the owners of the land on which the project was being undertaken and not St. martin depones and those he dealt with are the ones who had been assigned the role of overseeing the project owners than S.R. Prisca M. Wagura who emerged as the major liaison person for the project. This is proved by the fact that she received the brief, drawings and other consultancy input by the second Respondent which documents were used by her to sought donor funds for the project. It is in the same capacity. That a sum of Kshs 100,000/= was paid through cheque number 40031 being reimbursement costs for the preparation of the brief in both tabulation and preliminary Architectural Drawings.

7. The said 2nd Respondent exalted his work professionalism as an Architect working under Cap.525 which professionalism led to the approval of the scheme design and work drawings, by the applicants, local authority, and the Donors which resulted in the construction of

- a girls secondary school.

- a vocational training centre for goods.

- a community hall.

All these structures were alleged to be duly constructed and standing as at the time of the deponement of the said affidavit.

8. In accordance with the professional standards under Cap.525 Laws of Kenya, the 2nd Respondent raised fee notes six in number which were paid between December 2000 and September, 2001 totaling to Kshs 292,217/=. Part of the payment was in cash and part in cheque from drawn on account number 204467400 Standard Chartered Bank Karen Branch which in his belief belongs to the applicants.

9. Him 2nd Respondent has knowledge that in the course of the transaction between him and the applicants canceling the said project, the applicants used different addresses to correspond with him all of which he believes belong to the applicants.

10. That throughout the duration of the execution of the works aforementioned, the applicants were using rubber stamps. At no time did they use a seal.

11. That given the fact that other members of the applicants were participating in the project execution, it is the 2nd defendants stand that one St. Prisca Wagura participated in the project as such, all of whom attended:-

- site meetings.

- Tender opening meetings

- Unveiling of commemorative plagues, of

- Lying of foundation stones.

- Issues part payment of fees.

12. That having used his drawings to solicit donor funding and having used the same drawings to put up the structures mentioned, the 2nd Respondent of the firm view that the applicants were his clients, who issued instruction to him, which instruction were carried out by him, 2nd Respondent, which execution of work or clients instructions, resulted in the construction of structures for the benefit of his clients who are bound to pay for his services.

13. By reason of matters afore said, him the second respondent was entitled to demand for payment for the services rendered from his clients and when they failed to pay the entitled to refer the matter for arbitration in accordance with the propositions of the Act Cap.325 under which the works had been executed. At no time did him, 2nd Respondent informed by any of the applicants that he was new or commissioned nor that:-

- there was no privity of contract between him and them.

- They made part payments in respect of the works under Cap.525

- Approved and used his documents and drawings to carry out the project using his drawings and as such they applicants are estopped from denying that they were no this clients.

14. Him 2nd Respondent, is not aware of any other party who ought to have been joined to these proceedings, as all along he was dealing with the applicants.

In their oral submissions in Court, the Counsel for the applicant reiterated the content of their deponment and then stressed the following points:-

(i) That there is no privity of contract between the applicant and the 2nd Respondent.

(ii) The correspondences relied upon by the 2nd Respondent were not signed by the Registered Trustees for the applicant as they do not bear the signature of the Trustees nor the seal of the applicant.

(iii) In the absence of a privity of contract between the 2nd respondent and the applicant, there is no way a client relationship could stand.

(iv) There is no express agreement between the parties that in the event of any disagreement arising from the arrangement the matter should be referred to arbitration.

(v) The law requires that tin order for parties to resort to arbitration for a resolution of their disputes – there must be an express term in the agreement, that the parties will resort to arbitration. No such express agreement exists in the circumstances for this case.

(vi) The applicant cannot be made to suffer for the transaction it was not party to.

As for Counsel for the 1st Respondent she relied on the content of the deponent of the 1st Respondent and then stressed the following points:-

(1) Him 1st Respondent was appointed by the relevant authority as an arbitrator under clause A7, of the 4th Schedule of Cap.525 Laws of Kenya and as such he was properly seized the matter.

(2) That him the first Respondent looked at the correspondences exchanged between the parties and then come to the conclusion that he had jurisdiction.

(3) They contend that him 1st Respondent has been misjoined to these proceedings because he has no interest in the dispute.

(4) That the correspondence submitted by the claimant, 2nd Respondent revealed that work had been undertaken under the relevant Act, it had been done, fees were payable and on the basis of that the 1st Respondent was justified in assuming the assigned role of a sole arbitrator and was therefore justified in ruling in the manner he did that the had jurisdiction to entertain the matter. This is based on the fact that the appointment was valid and he accepted that appointment.

(5) They contend that by the applicant choosing to come to this court by way of an originating summons, they have contravened the provisions of the Arbitration Act l995, in that a reading of Section 6,10 and 17 of the said Act envisages presentation of a plaint and not an originating summon.

(6) They also contend that it was wrong for the Court to intervene and put a stop to the progress of the arbitration process as Section 6(2) envisages a situation where by the arbitration proceedings can proceed to their logical conclusion while the court proceeds with its proceedings.

(7) They also contend that the originating summons is incompetent because it was presented out of time. The decision of the arbitrator was made on 5.4.04 necessitation necessitating the application in court to be presented by 5.5.04. But it was not presented to court until 14.5.04. It was therefore filed out of time and without leave of court.

(8) They also contend that the claimant filed a claim before the arbitrator to which eth applicants filed a defence and by so doing both parties had submitted themselves to that jurisdiction and as such they cannot turn round t attack it.

(9) They contend that there is no common point of law to be determined between the applicants and the respondents and such there is a mis joinder of parties and so this court should invoke it showers under order 1 rule 10 Civil Procedure Rules and strike out the first Respondent form these proceedings.

(10) None of the prayers sought by the applicant fell under the matters that are to be brought by way of originating summons in terms of order 36 Civil Procedure Rules.

Turning to the second Respondent he too reiterated the deponenments in his replying affidavit and then stressed the following points:-

(1)That he relies on the documentation annexed to show that he was commissioned by the applicants to

do the said project and that the applicants participated in the execution of the said projects.

(2)He contends that Dr. Prisca Wagura was their representative in the supervision of the work as well as the commissioning of the work.

(3)The fact that the applicants complained about his conduct to the Architects and quantity Surveyors board about his conduct and not Dr. Prisca is sufficient proof that indeed him the 2nd Respondent was working for the applicants. This is further confirmed by the fact that in his acceptance letter he confirmed that the terms of commissioning were these stipulated by Cap.325 Laws of Kenya. And also when they complained about this his conduct they did so in accordance with the provisions of that Act.

(4)The fact that the applicants have annexed the advise on how to draft the commissioning letter as well as the commissioning letter itself is proof that they were aware of him 2nd Respondent being commissioned but they perused no complaint.

(5)The Applicants are indicated in the documents, displayed as the sponsors of the projects.

(6)They applicants benefited from the work done by the second Respondent as they used documents prepared by the second Respondent to service funds from Donors which funds were received and used to put up the project.

(7)They have canceled making payments to me, termed as part payment by Dr. Prisca who was their representative and gratuitous payment by them which fact confirms the client/architect relationship which compelled them to complain to the board about this conduct.

(8)Him the second Respondent contends that all the elements necessary for the formation of a contract namely – offer the applicants did a letter of offer to him, acceptance, he did a letter of acceptance to them performance based on the facts that plans prepared were used to source funds from the Donors and construction work was based on them and last consideration which was partially performed through part payment which the applicants letter changed and started calling gratuitous as mentioned in their letter of complaint to the Board. Fro this reason they maintain that the objective of the applicant which was specific, certain and legal, it was possible and it was achieved, and for this reasons the applicants are estopped from raising any objection to the jurisdiction for the Arbitrator.

(9)The applicants cannot be heard to complain about the mode of appointment of the arbitrator as they did not plead this as one of the questions to be inquired into. That not withstanding him 2nd Respondent has knowledge that notices were sent and when the parties failed ot nominate an arbitrator the authority concerned acted within the law to nominate one.

(10) They maintain that nowhere in the Trust Deed exhibited does it say that in order for any contract entered into by the applicants to be valid, it has to be sealed and not stamped. It is his view that the issue of the seal/was just being raised to justify failure to pay.

(11) The Court is urged not to agree with the applicants assertion that the contract was casual evidenced by the fact that:-

- the 2nd respondent over saw the constitution work

- attended all the site meetings to review the progress of the construction work and also attended ceremonies performed by the applicant in relation to the said construction work i.e. ground breaking ceremony, laying of the foundation stone and unavailing of the commemorative. Plague etc.

- They paid almost 400,000.00 for services rendered.

- They complained of misconduct arising from the performance of the said work.

- Still maintain that one Sister Prisca was acting within the law on behalf of the applicants and not on her own behalf. Neither did the applicants protest her presence. Instead they honoured her Agency by making part payment for the work done, with both the 2nd Respondent and Dr. Prisca acted in good faith. The works of Dr. Prisca having been facilitated by the applicants, who provided the land on which the construction work was done as there is no denial that titles are in their name they applicants also facilitated venues for the meetings and payments for work done has come from them bank accounts and when aggrieved by his conduct they complained to the relevant Board on the basis of the above points, the 2nd Respondent urged the court to dismiss the originating summons for being an abuse of the due process of the court.

In response to submissions of both respondents, counsel fo rth applicants reiterated their earlier submissions and then added the following points:-

(i) In response to the 1st respondents plea that they are misjoined to these proceedings, Counsel stated that firstly a suit cannot be defeated on the ground of misjoinder to these proceedings, Counsel stated that firstly a suit cannot be defeated on the ground of misjoinder and secondly, Sections 10 and 13 of the Arbitration Act l995 relied upon by the 1st respondent does not support their plea of misjoinder. Thirdly there is no provisions in the Arbitration Act l995 which prohibits joinder of an Arbitrator to a court proceeding.

(ii) The applicant id not appeal against the arbitrators ruling on the applicants preliminary objection but chose to invoke the original jurisdiction of the court under Section 7 of the Arbitration Act.

(iii) Since the applicants intends to correct the commission and the omission of the 1st Respondent, the only proper thing to do was to join him to these proceedings and as such he is properly enjoined to these proceedings.

(iv) They maintain they invoked the provisions of Section 17 of the Arbitration Act to approach the Court, for the relief sought and they be properly before this court, by way of an originating summons.

(v) The argument of the 2nd Respondent does not hold because he failed to produce civil document bearing the seal of the applicants.

(iv) The registered trustees are set out in the certificate of incorporation which is also clear on appointment of new trustees, none of these trustees have been shown to have transacted with Dr. Prisca as an agent of the applicant and yet there is no certificate of appointment of the Prisca as a trustee has been exhibited.

(v) in the absence of establishment of a link between Sr. Prisca and applicants on the one hand, and the 2nd Respondent on the other hand, there was no basis for appointing the first Respondent as an arbitrator and as such the respondents ruling that he had jurisdiction to handle the matter as presented to him was wrong.

(vi) They still maintain that the applicant being a registered trustee could only transact through trustees and not through 3rd parties. As such the second Respondent should have taken precaution as stipulated by the provisions of sections 14 and 15 of the trustees perpetual Succession Act Cap 164 Laws of Kenya and ensure that he does not contact with another person apart from the Registered Trustees.

(Vii) Section 13 of the said Cap 164 states clearly that the only documents that can bind the Trustees is the one that bears the seal of the trustees.

(viii) They ask the court, to be guided by the case law cited by them and on that account asked the court, to grant them the prayers sought in the originating summons.

On case law and legal text the court was referred to text **by Andrew and Karen Tweeddle on a**

practical approach to arbitration law by Blackstone Press limited. At page 86 Chapter 6. On parties, paragraph 6.2. Line 13 from the bottom it is stated:-

"***The capacity of a party to enter into an arbitration agreement is governed by contract law principles. The general common principle is that all persons should be bound by the contract that they make"***

The case of **WASIKE VERSUS SWALA (1985) KLR 425**, where the court of Appeal held inter alia that:-

(1) A reference to arbitration should be make with the express agreement of all the interested parties. There was no valid reference to arbitration in this case"

On the courts' assessment of the facts herein, it is clear that the submissions of the three parties participating in these proceedings herein invited the court to rule on the matter on two fronts. The first one is the technical front, mostly raised by Counsel for the first respondent touching on the misjoinder of the first respondent to these proceedings, as well as the competence of the entire originating summons, for reason given in the submission. Where as the second aspect touches on the originating summons of the applicant and the second respondent.

It therefore follows that in order to resolve the matter it is prudent to set out some of the important facts herein though in a summary form to form an anchor for the submissions on record since parties opted to go by way of affidavit evidence as opposed to adduction of viva voce evidence. The tread of the argument can be traced to the documents of the second respondent, who said they had discussions with the applicants, through one sister Prisca M. Wagura, concerning the preparation of drawings to enable the applicant's source funds to put up certain facilities. An agreement was reached verbally between them, where upon the 2nd respondent prepared rough sketches which he discussed with the applicant through Sister Prisca Wagura, who approved the same. It is after such approval being made, that the 2nd respondent asked for a letter of commissioning so that he could perfect the drawings. It is his assertion that since the applicants did not know how to prepare a letter of commissioning, he assisted them by preparing a sample for them, since the letter had to comply with the relevant Act Cap 525 laws of Kenya. Copies of these are annexed to the further affidavit sworn by one Wanja G. Wambugu on 25th May 2004 and filed on the same date.

Annexture WGW (Ai) is the note from the second respondent forwarding the commissioning letter sample. It is dated 26th October, 1999. It is a hand draft and it reads:-

"***Sister Prisca***

RE: GIRLS SCHOOL

Hereby forwarded please find a sample letter for commissioning consultants. You may make adjustments to suit.

Signed

D.K. Gichuki 26th October 99"

It is the second respondent's sand that the said letter was not compulsive in nature and it gave leeway for adjustments. The sample is annexutre (WGWA ii)

The commissioning letter is marked (WGWBI). It is on the headed paper of St. Martin De Porres Vocational Training Centre Kiserian. The content reads:-

"***26th October, 199***

Our ref: 001

M/S/Complan Consulting Architects

P.O Box 66314

NAIROBI.

Att. Mr. D.K. Gichuki

Dear Sir,

RE: PROPOSED GIRLS SECONDARY SCHOOL AND VOCATIONAL TRAINING CENTRE AT OLOOLOITIKOSHI KAJIADO DISTRICT

The assumption Sisters of Nairobi intend to put up the above institution. The purpose of this letter is to commission you as the Architects and lead consultant for the project. You will be required to among other things undertake the Brief formation, Design, Supervision and co-ordination of the project up to successful completion and handing over of all to our approval of every stage of the works.

In carrying out of these works, engage other consultants as necessary whop may be answerable to us, through you as the project co-coordinator and lead consultant. Please confirm by return mail your acceptance of this commission, high lighting your terms of reference and ensure that we approve the project's brief before advancement of the designing.

Yours sincerely, in Christ

SR. Prisca O. Wangura"

The second respondent responded to that correspondence vide a letter dated 1st February, 2000. it is marked as annexture "WGWC". It is on the headed paper of complain consulting Architects. It reads-

"***Our ref. CP/9910/01 Dated 15th February 2000 St. Martin De Porres Vocational Training Centre-Kiserian,***

P.O Box 25264

NAIROBI

(Att. Sr. Prisca)

Dear Sister Prisca

RE: PROPOSED GIRLS SECODNDARY SCHOOL AND VOCATIONAL TRAINING CENTRE AT OLOLOOOLTIKOSHI, KAJIADO

Subject: Commission as a building project Architect and lead consultant

We acknowledge receipt with thanks of your letter ref: 001 of 26th October, 1999 on the above subject. The content of which have been noted.

Firstly please accept our sincere apologies for the delay in replying to your letter. We now confirm that we fully accept this commission, with our terms of reference being Cap. 525, the Architects and Quality Surveyors Act.

The other members of the consulting team to be appointed at our discretion as provided for in Cap 525 i.e as and whenever necessary and in accordance with the standard terms applicable to each respective consultants will be:-

- ***Quality surveyors civil***

- ***Civil structural Engineers***

- ***Electoral/mechanical Engineers and cadastral topo graphical survey engineers.***

In order to achieve a professionally integrated report we are already consulting with quantity surveyors, civil structural engineers and services Engineers whose in put in their various areas of specialization is very crucial at this initial stage of outline sketch and scheme design proposals.

We already have had preliminary Design Teams liaison meetings with them, which have facilitated the preparation of the Architectural drawings, that were the subject of your discussion on 12th January 2000 with our under signed at your Lavington convent offices.

Lastly we take this opportunity to thank you most sincerely for offering us this opportunity to work for you and assure you that the work will be carried out with utmost professionalism while liasing and seeking your approval at all stages of work.

Yours Sincerely

Signed

Dr. Gichuki

For Complan Consultants

Architects"

The applicants on their part have exhibited very skeleton documents. It is not known whether the selectiveness is by a deliberated design to withhold information from the court, or they simply choose to exhibit what they felt was necessary to prove their case. This selectiveness of documents on their part, does not bring out the scenario of what led to these proceedings. It is therefore imperative for this court, to turn to the assistance of a party who has exhibited most documents on the dispute, assess them, in order to understand the really issues in controversy fro determination by this court. This party is not the applicant, because they applicants have selectively exhibited scanty documents. The court, however does not know whether this was deliberate or in advertent. The party who has exhibited most documents on the dispute is no other than the 2nd respondent. This courts excursion into those annextures reveals the following:-

1. DKG01 is titled A.S.N. Girls Secondary and Vocational School in Ololooltikoshi Kajiado District-project schedule of accommodation and summary. It is dated 6th October 1991and on the headed paper of complan. What was to be constructed is indicated as

(a). Office administration block, comprising Receptionist/Secretary, Headmistress office, Deputy headmistress office, Boardroom, Directors office, co-coordinator, staff room, photocopy room, head of departments office (6no) general store and sanitary facilities.

(b). Kitchen and Dining comprising, cooking area and cold stores, cateress office, sanitary facilities and dining hall.

(c). Tuition block comprising 4no class rooms for secondary school, 2no classrooms fro vocational training, agricultural room, home science block, laboratory bock and library with study bays.

(d). Hostels accommodation comprising secondary school and vocational training.

(e). Dispensary to serve the school and the local community.

(f). None formal education to serve the local community.

(g). Chapel-capacity 250 seated to serve the school and local community.

(h). Multipurpose hall comprising stage, back stage and changing room.

(i). Staff accommodation comprising.

(i). Teaching staff and the sister house.

(ii). Non teaching staff categorized as follows:

(a)Senior accountant, bursar, cateress, matron, nurse, librarian, lab technicians, secretary.

(b) Senior- accountant, clerk, stores clerk, typists, messengers, drivers, electrician, and carpenter.

(c) Subordinate – cooks, watchmen, grounds men staff, attendants.

(1) Gate house.

Against each item, is indicated the area required in square meters, estimated cost for each area is also given, but titled, estimates for Baraka Academy.

(2) DKG02- Commissioning letters already set out herein.

(3) DKG03 acceptance letter by the 2nd respondent already set out herein.

(4) DKG04- appears to be an applicant for financial assistance. The name of the applicant is indicated as Assumption Sisters of Nairobi. The individual in-charge and responsible is indicated as Dr. (Sr) Prisca M-Wagura and the committee. The project site indicated as Ololooltikoshi, Kajiado District, and Rift Valley Province Kenya. The title of the project for which financial assistance is applied for s to be establish high school for Masai Girls. On the second page the project the project, title is given as establishment of Baraka Entoyia Academy, for Masai Girls in Kajiado District- Kenya. It is indicated that the sponsor and legal holder is Assumption Sister of Nairobi. The purpose of the request for the project is financial assistance to establish a high school for Masai Girls. The project Director is given as SR.(DR) Prisca M. Wagura and the date of the project is given as March 2000.

There is also a project for the construction of classrooms and administration block of proposed Baraka Primary School (phase 1 in Masai land. The applicant is Assumption Sisters of Nairobi. The contact person is indicated as Dr. SR. Prisca M. Wagura. The project site is indicated to be at Oloololtikoshi training centre Ngong Division, Kajiado District, Rift Valley Province. Funds applied for were to be from the British High Commission small grant. The date given is February 2001.

In the same bundle, there is traced a document titled request for financial assistance from Ing Dr. Mando Rapoilatesta and wife for a proposed girls vocational training centre at Oloololtikoshi Kajiado District in Masaai land- Kenya. The title of the project is proposed Baraka Entoyia Girls Vocational Training Centre at Oloolotikoshi- Kajado District. The project site is at Oloololtikoshi Kajiado District Rift Valley Province Kenya. The project facilitator is given as Assumption Sisters of Nairobi. The project Director is given as Dr. (SR.) Prisca M. Wagura and the date is given as 8th November, 2000.

In the same bundle of annexture DKG04, there is traced a letter of allotment REF. No

OCC/LND/16/Oloolindi" log/Vol. 1/46 dated 26th May 2000. it is signed by one A.M. Leina Clerk to Council. It is on the headed paper of Kajiado County Council and addressed to Assumption Sister of Naiorbi Amani Church and dated 8th December, 1998 signed by Sister M. Felix Mwikali, the superior general. The central theme in it is that the congregation has received pontified recognition by the Pope John Paul II as a religious institute. The decree is issued at Vatican May 27,1998. next to it is what appears to be a certificate of incorporation for Assumption Sisters of Nairobi, Registered Trustees, issued under chapter 286 laws of Kenya now cap. 164 laws of Kenya. The content is not very legible. Three names of trustees are given but these are not legible. The document was registered against number 346/1 on 11th April, 1973. There is also a letter dated June 6th 2001 by Dr. Sr. Prisca Wagura addressed to Dr. Ing Rapolla Testa and the family and Fr. Michael Bardana giving explanation about the short comings of the project, apparently sponsored by the addressees with a promise to improve on the performance.

There is also a letter dated second May 2000 addressed to M/S Complan Consulting Architects attention, the 2nd Respondent. The central theme in it is that it maintains that a meeting had been held at the Japanese Embassy on 10th April, 2001 attended by Sr. Prisca, Donor representative, a Mr. Gichuki. It is indicated that pursuant to that meeting the 2nd respondent had revised the plans and the writer A.O. Otieno for Ojwang Otieno and Associates had also revised the construction cost estimates for the 2nd defendants action.

(5) DKS 05 is a letter of allotment dated 22.5.2000 already mentioned. Next to it is a title deed number Kajiado/olchoro – Onyore/3349. the title holder is given as Assumption Sisters of Nairobi, and the same was issued on 24th day of January.

(6) DKG 06 is a letter dated August 2nd 2002 under the hand of r. (SR) Prisca M. Wagura inviting the second respondent and the consultant team to attend the occasion of the foundation stone and commemoration plague to Baraka Education Centre- Olooloitikoshi in Kajiado District on Thursday 9th August 2001.

There is vital information in this documents to the effect that an Italian Family of Dr. (Eng) Rapollatesta has founded the technical section of the education centre at a cost of Ksh. 14 million where as the other sections of the educational centre namely Baraka Secondary School for girls was indicated to have been founded by the Japanese Embassy and a multipurpose hall founded by the German Embassy. Under the same number there is a communication on the headed papers of Fame Consultants limited signed by one Engineer. F.M. Kimani dated 22nd August 2001 addressed to the Director Baraka Ntoyie Scool-Kiseerian att. Dr.(SR) Prisca. The information passed on is to the effect that the writer had forwarded the application for service user granted on behalf of the Assumption Sister of Nairobi. The Application for the service for grant is annexed. Scheming through reveals that among other details, the name of the enterprise is given as Assumption Sister of Nairobi. Where as the contact name and positions is given as Dr. (SR) Prisca M. Wagura, the project Director/Trustee. Type of enterprise is shown as a religious women organization. The owner of the enterprise is the Catholic Church. Registration number of the enterprise is given as Ps/346/1 Assumption Sisters Reg. Trustee. Date of Registration of the enterprise is given as 11th April, 1973. At item 35 in response to a question as who to carry out the project, in response there to the following information is given.

(a). Complan consulting Architects –Architects fees Kshs 3,647,023.30

(b). Design and drawings fees Kshs. 2,989,328.90

(c). Detailed Civil and structural engineering designs and drawings fees Ksh. 2,800,000.00

(d). Detailed cost estimates and preparation of bills of quantities and specification Kshs. 9,433,352.20. At the bottom of the documentation there is a letter of request for an EBAS grant and formal undertaking. It is signed by one Dr. (SR) Prisca M. Wagura in her capacity as the Director. It is dated 30th July 2001 and Rubber stamped Assumption Sisters of Nairobi P.O Box 25264 Nairobi 30.07.2001.

(7) DKG 07- Is a bundle of drawing and plans for Baraka Academy.

(8) DKG 8 on the other hand is titled Final approval scheme design drawings also in a bundle.

(9) DKG 09 on the other hand is titled works following instructions of 6th December, 2000.

(10) DKG 10 on the other hand is titled working drawings also annex in a bundle, each copy is rubber stamped with the stamps of Assumption Sisters on 13.9.2001.

(11) GKG 11 is a communication dated 15th February,2000 by the second respondent to St. Martin Deporres vocational training centre- Kiserian asking for reimbursement of costs incurred on the project preliminary Architectural drawings and preparation of costs estimates to the tune of Kshs. 144,947,000 changed by free hand to read 144,905.00. On the same date of 15th February 2000, the 2nd respondent acknowledged receipt of a cheque No. 400316 of 23rd February 2000 for Ksh. 100,000.00 on the subject and they looked forward to receive the balance of Ksh. 44,905.00 in due course. The letter is addressed to Martin deporres vocational training centre- Kiserian att. A.R. Prisca.

(12) DKG 12- are client consultant meeting minutes of the meeting held on 2nd May 2000 at Riverside drive offices of the Assumption Sister of Nairobi. In attendance was Sr. P.M. Wagura civil Engineer and the 2nd respondent as consultants. The agenda was for the discussion of the design and costs and presentations of the same to the donors. Included also are tender documents and correspondence exchanged between the consultants on the documents.

(13) DKG 13 is a communication dated 2nd February 2001 emanating from the 2nd respondent to the Director Baraka Entoyia School attention Sr. Prisca. It was forwarding a copy of the final Architectural scheme design drawings duly stamped to confirm approval by the Ole Kesuado County Council and another relevant bodies plus receipts for payments made towards the same. This was preceded by correspondence from the 2nd respondent to the Director Baraka Entoyia School dated 25.1.01, 26th October,2001 forwarding the drawings annexed at No. 7,8,9 and 10 to the client.

(14) DKg 14 is a bundle of documents on part payments of professional fees Kshs. 110,000/= paid on 4th December, 2000 accompanied by copies of cheques for the same payment. These also include correspondences emanating from the quantity surveyor to other service providers forwarding the payment for them.

(15) DKG 15, there is a communication emanating from Dr. (Sr.) Prisca M. Wagura addressed to M/S Ojwang Otieno and Associates dated November 14th 2000 appointing them as quantity surveyors as well as project manager.

(16) Dkg 16 is the bills of quantities together with a letter of confirmation of an a ward of tender dated 10th May 2001 from the 2nd respondent to one M/S K.G. Patel and Sons limited Nyeri informing them that they had worn the tender to put up Baraka Ntoiyie school for the Assumption Sisters. The said contractors gave a bond and insurance cover forwarded to the 2nd respondent by them on 25th July 2001, but it is dated 5th June 2001. Also exhibited is a confirmation agreement signed by Sr. Prisca Wagura and SR. Benedicta Kainda and rubber stamped Assumption Sisters, Nairobi, and the quantity surveyors as their witnesses and rubber stamped with the name stamp of the contractor.

Also annexed under this exhibit number are bundles of documents exhibiting proof of valuation of the project by the quantity surveyor followed by instructions to the second respondent as the Architect to issue completion certificates at various stages of construction. The document on completion and handing over of the contraction is not however included, but the 2nd respondent asserted that the buildings were duly completed and are in use to the present day.

The courts observations on the documentation exhibited by the 2nd respondent are as follows:-

(i). These go to prove that indeed the 2nd respondent was involved with the subject project otherwise, the court does not understand how the 2nd respondent could have accessed those documents. The court, is satisfied that it is correctly submitted by the second respondent that indeed he was closely associated with the project leading to these proceedings in his professional capacity.

(ii). They also reveal that the dealing or transactions on behalf of the project undertaken was executed by one Dr. (SR) Prisca M. Wagura as various described as the project director facilitator etc.

(iii). That no where in their dealings with the said Dr. (Sr.) Prisca it was ever mentioned that she had the mandate of the trustees or that she was executing the said duties in her capacity as a trustee.

(iv). None of the documents exhibited especially the drawings done by the 2nd respondent in conjunction with other consultants bear a seal of the trustees.

(v). That any document bearing a mark of the applicants was instead rubber stamped.

(vi). That although the project bear several names i.e St. Martin deporres vocational training centre, Baraka Academy etc there is no doubt that the undertakers of thee project were the Assumption Sisters of Nairobi.

(vii). The land on which the project was undertaken belongs to Assumption Sisters of Nairobi.

(viii). Plans for construction were approved by Ole Kejuado County Council through the 2nd respondent.

(ix). It is on record that part payment was made to the 2nd respondent as well as other consultants by the Assumption Sisters of Nairobi inclusive of payment made to the contractor against certificates issued by the second respondent.

(x). It is true that it is the second respondent who guided one Dr. Sister Prisca M. Wagura on how to prepare a letter of commission. But the court agrees with the second respondent's assertion that the communication was not compulsive. It did not interfere with the said Sr. Wagura discretion to issue the commission, vary it or withhold the same.

(xi). It is also correct that the plans and drawings prepared by the second respondent played a leading role in sourcing funds of the construction project.

(xii). The 2nd respondent was named in the application for service grant as one of the projects consultants namely, consulting and project Architect.

(xiii). It is also evident that other consultants such as the project engineer, and the quantity surveyor, corresponded and consulted the second responded as the consulting Architect of the project.

(xiv). It is also on record that the second respondent has correctly asserted that he was invited to participate in activities of the project i.e laying of the foundation stone, handing over the site to the contractor, ceremonies.

(xv). That all along one Dr. Sr. Prisca Wagura is the one who held herself out as the Chief Executive Officer of the said project, right from its cradle day up to the toddling stage.

(xvi). It is correctly asserted by the 2nd respondent that he made it clear right from the terms that would govern the relationship would be as per provisions of the parent Act namely the Architects and quantity surveyors Act Cap 525 laws of Kenya.

As noted in the observation above, part payment of fees was made to the second respondent. It is his

assertion that the payment was part payment of his professional fees, and that since the applicants declined to meet the balance, he and no alternative but to move under the provisions of the said Act namely, the fourth schedule. This court, had accession to peruse the same and it has found that it is titled conditions of engagement and scale of professional charge for Architects. Clause A6 and A7 are relevant to the judgment. These reads:-

"***Disputes A6 (a) Any difference or dispute my by agreement between the parties be referred to the Board for an opinions provided always that such an opinion is sought on a joint statement of undisputed facts and the parties undertake to accept it as final.***

<u>A.7 Arbitration</u>

(a). Where any difference or dispute arising out of the conditions of engagement and scale of professional fees and charges cannot be determined in accordance with paragraph A.6, it shall be referred to the arbitration by a person to be agreed between the parties or falling the agreement, within fourteen days after either party has given the other a written request to concur in the appointment of an arbitrator, to a person to be nominated at the request of either party by the president of the East African Institute of Architects"

The correspondence of what transpire between the parties before the appointment of the Arbitrator has not been exhibited. But it is apparent that parties did not move under clause A.6, thus forcing the 2nd respondent to move under clause A.7. But from his testimony he did report the dispute to the relevant board which moved under the relevant rules to appoint the respondent as an arbitrator.

The first defendant has exhibited 2 correspondences to his replying affidavit namely EK1 and EK2 is dated 25th February, 2003 on the headed paper of the Architectural Association of Kenya. It is under the hand of one Sylvester CM.Wafula as chairman AAK. It is addressed to Messers Wohoro and Muchiri Advocates commissioner for Oaths. The subject is disputes for Arbitration between Daniel Kungu Gichuki t/a Complan consulting Architects and Assumption Sisters of Nairobi.

Application for appointment of an Arbitrator. The content reads:-

"***I refer to your letter of 18th November, 2002 requesting for the appointment of an arbitrator in the above dispute. In pursuant to the above, and in exercise of powers bestowed upon me under clause A.7 Arbitration" on the Fourth Schedule of Cap. 525, I appoint Architect Stanley Kebathi of P.O Box 50725-00200 Nairobi and Tel. 574533 as the sole arbitration on the above dispute.***

By a copy of this letter I request A architect Stanley Kebathi to communicate his acceptance directly to the disputing parties and to commence proceedings at the earlier opportunity. The disputing parties have a right to legal representation during the arbitral proceedings and may call exparte witnesses, if they so wish. Please note that the disputing parties will pay arbitration fees as directed by the arbitrator.

Yours faithfully

Signed

Sylvester C.M. Wafula"

The response by the first Respondent is marked EK2, dated 4th March 2003. It is addressed to two people, Wohoro and Muchiri Advocates, Commissioner for Oaths and Sr. Maria Felix Mwikali ASN.

Superior general

Assumption Sisters of Nairobi

P.O Box 25054

NAIROBI

The subject Reads:-

"***<u>RE: DISPUTE FOR ARBITRATION BETWEEN DAVID KUNDU GICHUKI T/A COMPLAN CONSULTING ARCHITECTS AND ASSUMPTION SISTERS OF NAIROBI.</u>***

Application for appointment of an Arbitrator"

The content reads:-

"***I refer to the letter dated 25th February 2003 to me by the chairman of AAK appointing me as the sole Arbitrator in the above dispute. I wish to communicate my acceptance of this appointment to both parties. I shall be arranging with the parties in due course on a mutually acceptable date for the preliminary meeting.***

Yours faithfully

Stanley Kebathi FCIArb.

CC.

Sr. Prisca M. Wagura

St. Martin Deporres Vocational Training Centre Kiserian

P.O. Box 25264,

NAIROBI

MR. s.c.m. Wafula

Chaairman A.K.

P.O Box 44258,

NAIROBI"

Since the 2nd respondent moved first to report the dispute, leading to the appointment of an arbitrator, it is clear that the applicant's complaint about the 2nd respondents came afterwards. It is not clear what become of the same. It is however clear that the same is dated 22/05/2003 and received 27/5/2003. The salient features of the same are:-

(1) The subject of complaint is the 2nd respondent.

(2) Confirms that the 2nd respondent was actually involved in soliciting for funds for the vocational training institute.

(3) I is revealed that this project was complete and then the sister project of Baraka Academy was mooted.

(4) That the 2nd respondent came to know of the project by virtue of him being a committee member of the vocational training centre. Upon having knowledge of the same he immediately commenced

designing the structures even before the client requested for such a drawing and when questioned about it, the 2nd respondent stated that the same were for soliciting funds from donors.

(5) That in a crafty manner the 2nd respondent went ahead to ask the client for a formal letter to commission him as the lead as the project coordinator and lead consultant and coordinator of other consultants.

6) That the 2nd respondent then induced the client to write the letter of commission, through a sample letter for his appointment and also sample letters for the appointment of other consultants

7) That all these was done by an individual and not the decision of a committee of which the 2nd respondent was a party.

8) The second respondent went ahead to accompany the client to the Japanese embassy to solicit funds for the construction of the project. This yielded a grant of Kshs 5.3 million towards the construction of the institute with clear instructions from the donor that the said amount did not include cost of professional fees.

9) The 2nd respondent was also involved in soliciting funds from another donor Ing Rapolla Testa where the client was granted a sum of Kshs 13,840,300/= . By virtue of this exposure, the 2nd respondent was a member of a panel that was sourcing for funds from donors and he was a ware of the sentiments expressed by the donors as regards professional fees.

(10) That the donor maintained in number 9 above after great persuasion agreed to pay only Ksh.776, 000.00 only as token to be shared between all the consultants involved.

(11) The total costs of the project came to Kshs. 19,100,000/=.

(12) Architect had proposed drawings for structures whose total cost came up to Ksh. 187,438,175/= which was revised to Ksh. 156,000,000.00 and then revised a 3rd time to a figure of Ksh. 82,151,500/=.

(13) That the Architect abandoned the site in the year 2000 and communicated the said decision to the client.

(14) Matters stated in number 13 above not withstanding, the client had brought a claim for Ksh. 2,371,482.70 from the client as professional fees, notwithstanding that the said Architect had received a gratuitous payment of Ksh. 318,000/=.

(15) The purpose of the communication was for the relevant board to investigate the conduct of the Architect as the client felt strongly that he took advantage of their ignorance and continued to do so to their detriment.

(16) That given the nature of the client, it was hoped that the board would step in with a view to protecting them from undue exploitation (copies of relevant documents were annexed).

The said communication was annexed to the 2nd respondents affidavit sworn on 29th June 2005 and filed the same date as annexture "C". Also to a further affidavit by the same 2nd respondent sworn on the 7th day of October 2004 and filed on 23rd November 2004 as annexture DK G1 in a bundle.

In the same bundle of exhibit to the above mentioned further affidavit, there is traced a letter dated 24th June 2004 from the registrar architects, and quantity surveyors board by the name Kubasu Ndonga addressed to counsel on record for the applicants. A reading of the content reveals that it was responding to the complaint letter from them afore mentioned and notifying them that the matter was under consideration. It was copied to the second respondent. On the same date of 24th June 2004 the said

register did another letter to the second respondent notifying him that a complaint had been ledged against him concerning his professional conduct and that they were going to invite him soon to a meeting to clarify some of the issues raised in that letter of complaint. The communication was copied to the applicants counsel on record. Another communication on the subject is a letter dated 20th September 2004 from the same Registrar addressed to the 2nd respondent forwarding a copy of the letter of complaint in response to the 2nd respondents' communication on the same, dated second July 2004 and 20th September 2004.

It is not clear from the deponement of both sides what became of that complaint. However it is not disputed that the scenario moved to the arbitration proceedings conducted by the first respondent, in pursuance to the appointment made by the relevant authority, for him to arbitrate over the dispute. The arbitration documents have been annexed to the applicant` supporting affidavit. The statement of claim is annexture JC2 and it is dated 28th day of April 2003. The document is shown as David Kungu Gichuki the 2nd respondent, and the respondent, is shown as the assumption sisters of Nairobi, Registered Trustees, the applicants. The statement is detailed and as such there is no need to reproduce the same here. They will just be high litigated as hereunder.

(i). Items 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19,20,21,22,23,24 deals with the back ground information starting from the initial discussion held between Dr.Sr. Prisca and the 2nd respondent leading to the commissioning, preparation of drawing and estimates, revising of the estimates, culminating in the working figure arrived at, marking of the site, obtaining approvals from the relevant councils, before commencing of construction, soliciting of donor funds, commencing of the construction works, tendering processes, ceremony for ground breaking, site meeting, handing of the site to the contractor, reimbursement of expenses incurred by the second respondent towards preparations of the preliminaries, in order to commence construction. The a foresaid culminated in the presentation of the fee notes by the 2nd respondent, failure of the applicant to meet those fee notes, and then the filing of the dispute in accordance with the relevant Act .

(ii). Item 25 sets out the dispute and this reads thus:- " ***25 the claimant contends that the respondent by failing to settle the claimants fees, and further failing to raise any queries or objection in respect of the claimants works, the respondent is in breach of the terms and condition of engagement acknowledge under cap 525 Architects and quantity surveyors Act, and unless compelled by the tribunal, the respondent is not inclined to settle the claimants' dues herein. Indeed the respondent admits owing the claimants fees in their letter of 24th July 2001 while forwarding cheque number 40055 being part payment of Ksh. 64,000/= and all the documents is requesting is for the respondent to honour their obligation in the contract by paying the remaining part"***

(iii). Item 26 tabulates how the final figure claimed was arrived at.

(iv). It is pleaded that the tribunal has jurisdiction.

(v). In consequence thereof the claimant sought the sum of Ksh. 2,527,990.90, together with interest at commercial rates of 25% per annum commencing 15 days from the date when fees for each stage became due.

The statement of defence was drawn by the applicants counsel on record. It is dated 8th day of August 2003 and it is marked as J.G.3. The salient features of the same are that:-

(a). Vide paragraph 2 thereof, denied that Sr. Dr. Prisca Wagura was its representative or at all, denied that the said Dr. Wagura held any discussion with the applicant on its behalf and put the applicant to strict proof. It is further a total stranger to the alleged communication between the claimant on the one hand and Dr. Prisca on the other.

(b). Vide paragraph 3 there of, that it is a total stranger to the averments contained in the statements of claim. Went further to deny having received any brief from the applicant nor commissioning the said

claimant to do any work for him.

(c). Vide paragraph 4 thereof that it is a body corporate duly registered under the laws of Kenya and having a common seal.

(d). Vide paragraph 5 thereof, that it would raise a preliminary objection to the effect that there's no contract between the applicant and the respondent.

(e). Vide paragraph 6 thereof, that there is a mis joinder of the parties and that the applicant would apply at an appropriate time to have the claim against it dismissed.

(f). Vide paragraph 7 thereof that it will also raise a preliminary objection on jurisdiction.

The proceedings before the arbitrator, are not exhibited. Its therefore not clear to the court, as to whether the preliminary objection was lifted from the defence, filed, or one filed, but be that as it may, it appears the same was argued as between the parties, ruled upon sparking of the filing of the O/S.

A copy of the arbitration ruling is annexed to the supporting affidavit as annexure J.G.4 and the supporting affidavit sworn by counsel on record for the applicant in support of the O/S sworn on 14th day of may 2004. It is marked as annexure A. The heading thereof indicates clearly that it was "*arbitrator's ruling on preliminary objection on jurisdiction"*. The salient features of the same are as follows:

a. 1.00 the arbitrator, makes observation that vide a letter dated 26th October 1999 Assumption sisters of Nairobi box 25264 Nairobi commissioned the claimant Mr. David Kungu Gichuki of P O Box 06314 Nairobi which commission the claimant accepted in writing vide a letter on 15th February 2000, that the terms of the commission are those found in Cap 525 in which it was agreed inter alia that "…… any difference or dispute arising out of the condition of engagement and scale of fees and charges ……. It shall be referred to arbitration.

b. 2 .00 that a dispute did arise between the parties whereupon the first respondent was appointed by the then chairman of the architect and quantity surveyors of Kenya by a letter dated 25th February 2003 to be the sole arbitrator, which appointment he accepted in writing on 4th march 2003.

c. 3.00 That in pursuance to the appointment stated in number (b) 22.00 above, the said, 1st respondent, held his first preliminary meeting on the 18th July 2003 in the office of the Chartered Institute of arbitrators off Ngong Road in Nairobi where both parties were present. It is stated that the documents were exchanged and him the arbitrator was issued with a copy for each party.

d. 4.00 that during subsequent meetings in which the claimant represented itself, where as the respondent was represented by counsel on record the respondent raised a preliminary objection to the arbitral proceedings.

e. The objection raised were three on the basis of which the respondent asked the claimants claim to be dismissed on the grounds of :

- ***lack of jurisdiction***
- ***lack of privity of contract***
- ***mis joinder of parties***

f. 6.00 Both parties were heard verbally on their representations, and were also requested to file submission in writing in summary form.

g. 7.00 on lack of jurisdiction, the respondent who is the applicant herein had contended that the

arbitrator lacked jurisdiction because there was no written arbitration agreement. To which the claimant had replied that since the claimants' letter of acceptance indicated that the said services were provided on the basis of cap 525, which Act contained an Arbitration clause. On lack of privity of contract the respondent is alleged to have a greed that sister Dr. Prisca M. Wagura who executed the documents on behalf of the respondent was never in any way authorized to enter into contract what so ever, with the claimant, and on behalf of the respondent, further that any correspondence between the claimant and sister Prisca and any resultant contract thereof was therefore not binding on the respondent herein and was hence null and void as the common seal was not affixed to any contract documents between the parties. In response there to the claimant had maintained that there was a valid contract between the two parties as there was an offer, acceptance, specific performance, and consideration that sister Dr. Prisca Wagura was a director who for all practical purposes represented the respondent. That as regards the seal, the claimant stated that it had no control over the said which was in any case under the lock and key and fully in the respondents' custody. Further that all the other contractual obligations were carried out without the use of the seal.

On mis joinder of the parties the respondent objector had argued that the respondent was not a party to any dealings with the claimant because the Assumption sisters of Nairobi registered Trustees, who are the respondents are not synonymous with the Assumption sisters of Nairobi with whom the claimants was dealing, in the cause of the execution of the project, in which there now exist a dispute.

it is noted that in response to the argument on mis joinder, the claimant had relied on several pieces of evidence contained in the bundle of documents from both sides, and in the process arguing that Assumption sisters of Nairobi were the applicants sponsors and legal holders of the project of St. Martins deporres vocational training centre, project facilitation , owner of accounts which paid for its services, owned the land for the project and was registered as a corporate body under the none assumption sisters of Nairobi, Registered trustees that the project implementer was Assumption sisters of Nairobi who also issued cheques in payments of its costs and services.

Lastly that the centre was put up and run by Assumption sisters of Nairobi, and that sister Prisca M. Wagura was the main liaison person between the two as a director on behalf of the trustees and in that capacity she issued and signed the letter of offer to the claimant.

After due consideration of the rival arguments on the preliminary objection, the arbitrator made the following ruling:

"***8.00 Arbitrators ruling.*** ***Before giving this ruling, I will summarize my consideration of each o f the three points of objection.***

(a) Jurisdiction: ***I have carefully considered the arguments of both parties, with regards to the issue of lack of jurisdiction. I am satisfied that the services claimed to have been offered by the claimant were based upon cap 525 of the laws of Kenya which has a valid arbitration clause.***

(b) Privity of contract: ***having thoroughly considered the claim of lack of privity of contract and the arguments advanced by each party , I am satisfied that there was a valid contract between the two parties since there was an offer, an acceptance, performance and consideration.***

(c) On mis joinder of parties: ***Finally I have considered the objection from the aspect of misjoinder of parties as presented by the respondent, and rebutted by the claimant. From the arguments of the claimant. From the arguments of the and the references it relied upon, I have concluded that the respondent is the body corporate named Assumption sisters of Nairobi registered trustees, which is correctly referred in this arbitration as the respondent.***

From the foregoing, the application to strike out this arbitration fails on all three counts, namely, lack of jurisdiction, lack of privity of contract and misjoinder of parties. I therefore rule that this arbitration is properly instituted and shall proceed. I order and direct that this tribunal shall next convene in the offices of the chartered institute of arbitrators on 9th April 2004 at 2.30 p.m. to set new dates for its

continuation.

9.00 costs of this application shall be costs in the reference. Arbitration ruling on preliminary objection to jurisdiction made and published by me in Nairobi, which is the seat of this arbitration, on 5th April 2004, signed Stanley Kebethi FCIArb Sole Arbitrator date 5th April 2004 in the presence of name, Sara N. Nyaga address Box 50725-00200, signature.

As mentioned earlier in this judgement, the ruling on the preliminary objection led to the filing of this orginating summons. The prayers sought are already on record. The content of the entire record has been displayed herein. What is left for his court, now is to determine the originating summons. As mentioned earlier on, the submission of all the parties have presented issues for determination by the court on two front namely the merit front and the technical font. The technical front raises issues of misjoinder of the first respondent to these proceedings, and the competence or validity of the originating summons itself. Where as the merit aspect deals with the merits of the complaints raised by the applicant and as responded to by both the first and second respondents. Since the technical points go to the root of the originating summons, it is better for these to be determined first, because if upheld then the merits will be gone into solely for purposes of the record, jurispondence and what the court, would have held had the applicants complaint been upheld.

The technical objection, here in was not raised in the deponement of 1t respondent, but the 1st respondents counsel has raised them in her submission. From their look, they are legal points of law. This court, has judicial notice of the fact that legal points of law, can be raised at any stage of the proceedings, either via a formal notice or informally, orally in court. Herein they were raised in the submissions and responded to by the applicants counsel, and so it is safe to set them out and consider them one by one. The points raised by the first respondent are as follows:-

1. The originating summons is in competent because section 6, 10 and 17 of the arbitration Act 1995 requires presentation to court to be made by way of plaint and not petition.

2. That the court, intervention to stop the arbitration proceedings from progressing contravened section 6 (2) of the same Act.

3. The application is in competent because it was presented out of time. The ruling was delivered on 5/4/2004 and so the application seeking the courts' intervention should have been presented to court, by 5/5/2004. But it was not presented until 14th may 2004. The same was therefore presented out of time and without leave of the court.

4. it is there contention that the proceedings are unwarranted since the 2nd respondent submitted claims to the arbitrator to which the applicants responded and as such both parties had submitted themselves to arbitration process. It is therefore wrong for the applicants to turn round and attack them.

5. that none of the matters raised by the applicants fall into the categories that are supposed to be disposed off by way of originating summons as envisage by order 36 of the CPR.

On the issue of mode of presentation of the complaint, to seek the courts' intervention, reliance has been placed on the provision of section 6, 10 and 17 of the Act. These provide:-

"***6 (1) A court, before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings, or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds:-***

(a) That the arbitration agreement is null and void, in operative or incapable of being performed, or;

(b) That there is not infact any dispute between the parties with regard to the matter agreed to be referred to arbitration (2) not withstanding that an application has been brought under subjection (1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral a ward may be made.

(10) Except as provided in this Act, no court, shall intervene in matters governed by this Act.

17 (1) the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement and for that purpose, (a) an arbitration clause which forms part of contract shall be treated as an independent agreement of the other terms of the contract, and;

(b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however a party is not precluded from raising a plea because he was appointed or participated in the appointment of an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority is raised during the arbitral proceedings.

(4) The Arbitral tribunal may in either of the cases referred to in Sub section (2) or (3) admit a later plea of it on condition the delay is justified.

(5) The arbitral tribunal may rule on a plea referred to subjections (2) and (3) either as a preliminary question or in an arbitral a ward on the merits.

(6) where the arbitral tribunal rules on a preliminary question that it has jurisdiction, any party aggrieved by such a ruling may apply to the high court within 30 days after having received notice of that ruling to decide the matter.

(7) The decision of the high court shall be final and shall not be subject to appeal.

(8) While an application under subjection (6) is pending, before the high court, the arbitral tribunal may continue the arbitral proceedings and make an arbitral a ward."

This court has constructed section 6, 10 and 17 mentioned by the 1st respondents' counsel alleged to be allowing the mode of procedures adopted by the applicants in seeking the courts' intervention, and finds that the mode of approach for the courts' intervention is not given. Save that under section 6 (1) thereof, the situation envisaged is where a party comes to court, by way of plaint, that is when the respondent is invited to raise objection as soon as he enters appearance or files any other pleading. In this courts opinion, section 6 (1) does not envisage a situation where the parties started off with the arbitration proceedings and when ruled against is when they seek the courts; intervention. Section 10 on the other hand simply limits the courts power to intervene in matters dealing with arbitration. Where as section 17 on the other hand, vide section 17 (6) thereof gives a right to an aggrieved party where an arbitral tribunal has ruled that it has jurisdiction to come to court to seek the courts' intervention. It does not give the mode of approach.

By reason of what has been stated above, the objection, that the applicant should have sought the courts' intervention, by way of plaint instead of an originating summon, in the manner sought, is overruled and the court, rules that the applicants presentation of the originating summons is proper.

As regards contravention of section 6 (2) of the arbitration Act, by reasons of participating in the arbitral proceedings by filing a defence, and participating in the arbitral proceedings and then coming to court, there after, the court, finds that there is no contravention, because, the right to approach the court, is given

vide the said section 17 (6) of the same ACT. This is by reasons of the use of the word "may' it therefore follows that the applicants herein exercised their rights properly within the law, by coming to court within the perimeters provided by the law. As such they have not contravened any provision of the law. Save that the said section 6 (2) and 17 (8) of the same Act allows the arbitral proceedings, to continue along side the court, proceedings. A situation that did not exist herein, as parties obeyed the courts' intervention order, to stay the arbitral proceedings pending hearing and determination of the court, proceedings. Had the parties gone a head, and operated outside that order no contempt proceedings would have arisen as the same would have been sectioned by the law.

As for the time frame within which to present the application, indeed it is correctly submitted that section 17(6) requires the presentation to be made 30 days from the date the aggrieved party has notice of the delivery of the ruling. Indeed the ruling in the preliminary objection was delivered by the arbitrator on 5th April 2004. Indeed 30 days would normally start running from that date, if the ruling was delivered in the presence of the parties. However it is to be noted that the copy exhibited indicates that the ruling was delivered in the presence of one Sara N. Nyanga. Her connection to the proceedings is not given. There is no other documentation on the record showing when parties had knowledge of the said ruling in order for the time to start running from that date. In the absence of such proof, the court, is not in apposition to rule conclusively that the originating summons was presented outside the 30 days period allowed by the Act, which period is to start running from the date of the notice of the delivery of the ruling. The applicant will therefore be given the benefit of doubt. That objection is also overruled.

As regard the 1st respondent counsels' assertion that parties having submitted themselves to the arbitration proceedings, they should not be allowed to turn round and attack the same, the courts' stand is same as the one given when dealing with objection 2, that section 17 (6) of the Act, gives such a right and as such the applicants cannot be faulted when they availed themselves of that right. This 4th objection too falls assertion the 5th objection deals with that matters presented for interrogation do not fall among those that fall into the ambit of order 36 of the CPR. To resolve this, this court has no alternative but to turn to the said provision for construction. The marginal notes of each sub rule of order 36 CPR mentions the subject to be catered for under that sub rule.

(i). Rule 1 deal with matters relating to a deceased persons estate.

(ii). Rule 2 deals with issues touching on first.

(iii). Rule 3A deals with issues determinable between a vendor and purchaser of land

(b)Rule 3A caters for summons dealing with mortgage or mortgagor

(c) 3B deals with caveats

(d) Rule 3C on the other hand deals with extension of limitation period under cap 22 laws of Kenya.

(e) Rule 3D deals with issues relating to registration of title to land under cap 22.

(f) Rule 3E caters for applications dealing with applications for leave to marry under age.

(g) Rule 3 F deals with applications under the registered land Act cap 300 laws of Kenya.

(h) Rule 3 G deals with applications under the chattels transfer Act cap 28.

(iv) Rule 4 deals with summons by a member of a partnership

(v) (a) Rule 5 deals with summons by persons interested in deeds or deals.

(b) Rule 5 A deals with application, touching on variation of Trusts.

(vi) Rule 6 deals with the courts' discretion on application for construction of documents.

The other provisions under this order namely rule 7,8,8A, 8B,9,10, 11 and 12, deal with first registration, directions, procedure, evidence, power of the court, when handling the same, costs and interlocutory applications within the proceedings.

It is evident from the afore set out, of matters catered for under order 36 Civil Procedural Rules, there is no provision for intervention by way of originating summons under either section 6 (2) or 17 (6) of the Arbitration Act 1995.

The question the court, has to ask itself is whether the applicant stand non suited by reason of coming by way of originating summons. The court, has observed that infact the applicant did not even cite the order 36 Civil Procedure Rule procedures. Instead, they cited section 3A of the Civil Procedure Act. It reads:-

"***Nothing in this Act shall limit or otherwise affect the inherent power of the court, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"***

Case law has now settled situations under which this provision can be invoked whether by a litigant or invoked by the court, on its own motion. There is no harm in citing a few of them. In the case of **WANJAU VERSUS MURAYA (1983) KLR 276 KNELLER JA** (as he then was) held inter alia that "***section 3A of the Civil Procedure Act Cap 21, although saving the inherent powers of the court, to make such orders as may be necessary, for the ends of justice or to prevent the abuse of the power of the court, should not be cited where there is an appropriate section or order and rule to cover the relief sought."***

The case of **MEDITERANEAN SHIPPING CO. S.A VERSUS INTERNATIONAL AGRICULTURAL ENTERPRISES LTD ETCO(MSA) LTD (1990) KLR 183** where Bosire J as he then was (now JA) held inter alia that "***the inherent jurisdiction of the court should not be invoked where there is specific statutory provision which would meet the necessities of the case"***

Also the case of the **DEPOST PROTECTION FUND BOARD VERSUS KAMAU & ANOTHER (1999) (2 E.AC/C.AK) 67** where the court of Appeal of Kenya held inter alia that "***the inherent jurisdiction of the court, may only be called into aid within the confines of the jurisdiction by statute on the administration of justice but not the authority upon which to move the court for a remedy"***

Applying the foregoing principles to the originating summons herein, the court, makes a finding that section 6 & 17 of the Arbitration, not having specified the mode of procedure, when seeking the courts' intervention after arbitration proceedings have commenced, the applicant was entitled to come by way of originating summons. Further the fact that what they seek is not catered for under order 36 Civil Procedure Rules, is no ground for disentitling them to be heard on their claims. They were therefore entitled to invoke the inherent powers of the court. On that account the court, overrules the 5th objection and proceed to determine the matter on its own merits.

The first question deals with a determination as to whether there exist a written agreement between the applicant and the second respondent by virtue of which the arbitrator could use to vest himself of authority and or jurisdiction to arbitrate on the matter. Section 3 of the Arbitration Act 1995 has defined an Arbitration Agreement as "***means an agreement by the parties to submit to arbitration over or certain disputes which have a risen, or which may arise between them in respect of a defined legal relationship whether contractual or not"***

The Acts' definition does not provide tips on how to determine the existence or nonexistence of such an agreement. This being the case, the court, has no alternative but to turn to legal texts for assistance. The court, has had occasion to peruse Gill, the law of Arbitration by Enid A, Marshall, London sweet and Maxwell 2001 pages 15 – 16 and Bernstein hand book of Arbitration and dispute resolution volume 1 by John Jack berry also published by sweet & Maxwell in conjunction with the Chartered Institute of Arbitration London 2003 pages 48 – 49 Paragraph 2 – 112. The principles stated in both are basically the

same and state that an agreement in writing includes the following:

"***(a) An agreement in writing whether or not signed by the parties.***

(b) An agreement made by an exchange of communication provided they are in writing.

(c) An agreement evident in writing includes an agreement made otherwise than in writing but recorded by one of the parties or a 3rd party and provided this recording is authorized by the parties. Thus recording of a secretary or a short hand writer could surfice

(d) An exchange of written submission in legal or arbitration proceedings in which the existence of an agreement is alleged by party A against party B and not denied by party B.

(e) Any form of recording constitutes writing. Thus an authorized tape recording of an oral agreement would do.

(f) Finally reference in an agreement /oral or written to a written arbitration clause, or to a document containing an arbitration clause is sufficient to constitute an arbitration agreement if the effect of the reference is to make the clause part of the agreement"

A reading of these two texts show that the principle on how the existence of an arbitration agreement is to be determined, is settled as principles from both texts are similar.

Applying these to the facts herein, the court, finds that we do not have in existence an agreement titled "***agreement to go to arbitration in the event of any dispute arising from the transaction undertaken as between the applicant and the second respondent."*** It is common ground that what has been laid before the court, are 3 crucial pieces of correspondences exchanged between the second respondent and one Dr. Sr Prisca M. Wagura namely.

(i) Annexture WGWA (i) annexed to the further affidavit of Wanja G Wambugu sworn on 25th May 2002.

(ii) Annexture WGWA (ii) to the same affidavit being a sample letter of commission done by the 2nd respondent to guide SR. Wagura on how to draft one.

(iii) Annexture WGWB 1 which is the letter of commission signed by Sr. Prisca Wagura and addressed to the second respondent.

(iv) Annexture WGWC dated 15th February 2000 emanating from the 2nd respondent to one sister Prisca Wagura accepting the commission, and indicating the terms applicable, are as per the provisions of Cap 525, the Architects and quantity surveyors Act. When considered in the light of the above principles, these correspondences qualify to form an arbitration agreement. This is so because they talked of engagement to carry out works, which engagement was accepted by the 2nd respondent. The second respondent adopted the provision of cap 525 Law of Kenya, which in the Fourth schedule in cooperates, reference of disputes to arbitration, arising from the transaction, which was not denied by one Dr. Sr. Prisca Wagura. It therefore follows that the court, agrees with the findings of the Arbitrator for that indeed there was sufficient material on the basis of which the Arbitrator as confirmed by this court, could arrive at a conclusion that an Arbitration agreement exists.

Question 2 and 3 are interrelated, and will be determined as one. question 2 deals with the question as to whether there was privity of contract between the applicant and the second respondent. Whereas question 3 on the other hand deals with the question as to whether the applicant being a body corporate, duly registered and with a common seal, and registered trustees, had duly authorized one SR. Prisca M. Wagura to represent them in any way in the subject matter here to. Both these questions center on the role played by one Dr. Sr. Prisca Wagura in the whole transaction, whether she was acting on behalf of

the applicants or not.

The applicants though they have not said so in clear terms, seem to have disowned the said Dr. Sr. Prisca Wagura as having held any authority to act on their behalf in the manner she did. A determination as to whether Dr. Sr. Prisca Wagura has authority or not, will depend on the material put forward by each side in their assertion that she had no authority, as asserted by the applicant, and that she had authority as asserted by the 2nd respondent. A revisit to the applicants supporting affidavit only yields existence of a certificate of in corporation for the trustees, a statement of claim, defence, and ruling on preliminary objection as per paragraph 1,2,3,4 and 6. And information from counsel which is believed to be true as per paragraph 5 and partly paragraph 6. There is no other demonstration put forward by them, save that in support of the interim stay application. The interim application only had a ruling annexed to the further supporting affidavit, to that application had annexed documents which the court, has stated are relied upon to show existence of an arbitration agreement.

Turning to the second respondent, he has exhibited documentation already outlined on record. None contains a specific authority from the applicant that Dr. Sr. Prisca Wagura has specific authority to act for them in the transaction. It is however clear that the applicant has placed great reliance on the trust ship whereas the 2nd respondent has relied on conduct of the officer concerned.

The trust deal is marked as annexture J.G.1 to the supporting affidavit to the O.S. It bears the names of three trustees namely

(1) Sister Marie – Therese Gacambi

(2) Sister Lawrence Munanie

(3) Sister Teresia Munanu.

It is dated 11th day of April 1973. The affidavit does not contain any deponement as to whether the trustee ship, has ever changed or not whether the other two trustees, are still trustees or not. It is also to be noted that the same is silent about Dr. Sr. Prisca Wagura. No deponement that she was not one of them, and had no authority to act as such.

The trust deed had been incorporated under Cap 286. Laws of Kenya now repeated and replaced by Cap 164 Laws of Kenya.

Before looking at its legal effect, it is important to set out the salient features of the said trust deed as here under.

- ***The named trustees were to hold office until death, resignation or removal in accordance with the constitution of the above corporate body as per clause 2.***

- ***Clause 3 deals with appointment of new trustees.***

- ***Clause 4 gives the registered name of the trustees as "Assumptions sisters of Nairobi Registered trustees"***

- ***Clause 5 states that the common seal of the trustees was to be kept under lock and key. It reads:-***

- "***The common seal shall be kept in the custody of the trustees under lock and key in that office of the Assumption and shall not be affixed to any instrument except in the presence of at least two trustees who shall sign every instrument for which the common seal is so affixed.***

- ***Clause 6 vest land reference no 13103 within Thika Municipality in Thika District of the Republic of Kenya"***

This courts' construction of this trust deed is that

(1) it is not an end in itself. It mentions a constitution of the organization. It was therefore necessary for the applicant also to annex its constitution to enable the court, determine whether the operation of the said organization were to be executed only by the three trustees, or there was some form of delegation to some other officials within the organization.

(2) The parent body is Assumption sisters of Nairobi

(3) As per clause 5 the documents, that required the seal are those that required the signature of at least two trustees. The trust deed does not specify which documents would require the endorsement of two signatures of the trustees, in order for them to require a seal and which ones would not. It therefore follows that such details would be found in the constitution of the organization.

(4) It therefore means that instruments that do not require the signature of two trustees would not require the affixing of the seal. By exclusion such instruments would require some other form of authentication such as a stamp. Again details of circumstance under which a stamp would be required and not a seal would be found in the constitution and not the trust deed which constitution has not been exhibited.

Turning to the legal aspect of the trustee ship, section 3 (3) of Cap 164 – The trustees perpetual succession Act provides:-

"***The trustees shall there upon become a body corporate by the name described in the certificate and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name, and subject to the conditions and directions, or terms in the certificate, to hold and acquire and by instruments under the common seal, to convey transfer, lease charge otherwise any movable property or any interest therein now or hereafter belonging to, or hold for the benefit of the trust concerned in the same manner and subject to such restrictions and provision as trustees might so do without in corporation.***

4. The certificate of incorporation shall vest in the body corporate all movable and immovable property and any interest therein belonging to or held by any person or persons for the benefit of the trust concerned"

A reading of section 3 (3) and 4 of the said Act does not

(a) rule out self regulation.

(b) does not say that contracts entered into by the trustee ship must always be under seal only by the trustees.

(c) What is mandatorily required to be done by the trustee ship is that it has to sue and be sued in its corporate name.

Applying the above construction to the facts herein, the court, proceeds to make observations and finding that the applicants objection to the arbitration proceedings was to two fold namely.

(i) failure of the participation of the trustee ship in the transaction giving rise to these proceedings; and

(ii) absence of the trustee ship seal on the documentation relied upon as forming the contract leading to these proceedings.

Due consideration has been made to these and considered them is the light of the assessment above, and the reasoning given, and the court, makes findings that these have been ousted because.

(1) The legal protection accorded to the trustee ship vide section 3(3) of Cap 164 Laws of Kenya only protects the right to sue and be sued in the corporate name.

(2) It also protects divestation of property of the trustee ship which can only be done under the name of the trustee ship.

(3) The deed does not rule out self regulation and that is why it recognizes the existence of the organizations constitution.

(4) That only clause 5 of the trust deed makes provision for instruments that require to be sealed being those that require the signature of two trustees, meaning that the other instruments need not be sealed

(5) To resolve the issue in number 4 above it was necessary to exhibit the organizations' constitution in order to know the category of instruments that would require to be sealed and those that do not require such sealing.

(6) The trust deed does not state that all the functions of the organization are vested in the trustees. As such it does not rule out existence of an organization as structure that has expansion beyond the three trustees, which organization would have been revealed by the exhibition of the organizations constitution. This would have assisted in determining the mode of entry into contracts by the organization and whether delegation of duties by the trustees to other stake holders or players in the execution of activities on behalf of the organization.

(7) By reason of matters stated and observed in number 3,4,5, and 6 above, lawful involvement in the activities of trustee ship by one Dr. Sr. Prisca Wagura cannot be ruled out, evident by the following factors.

(i) There is no deponement in the supporting affidavit denouncing Dr. Sr. Prisca Wagura.

(ii) No denial that she exists and was and still is a member of the congregation.

(iii) No explanation has been given as to how they accessed documents meant to be in her custody

(iv) No explanation given as to why she was not joined to these proceedings

(v) No explanation given as to why no affidavit was solicited from her in order to shed light on how she came to be involved in the transaction leading to these proceedings.

(vi) The 2nd respondent gave a detailed replying affidavit and further affidavit, and on each occasion annexed documentations largely executed by the said Dr. Sr. Prisca Wagura. No explanation has been given as to why the applicant did not file a rejoinder to these allegations. In terms of the provisions of order VI rule 9 (1) Civil Procedure Rules, the applicant, is deemed to have admitted those facts as they neither denied them nor joined issue on them

(8) In the absence of any explanation as to why one Dr. Sr. Prisca Wagura was not made a party to these proceedings, and why no affidavit was solicited from her, leads to the drawing of a reasonable inference and or conclusion that the participation of the said Dr. Sr. Prisca Wagura in these proceedings would have been against the interests of the applicant.

Having established the lawful participation of one Dr. Sr. Prisca Wagura in there proceedings the court, has now to determine the existence of privity of contact. It is common ground that the elements necessary for the formation of a contract are the well known ones namely.

- offer

- acceptance

- performance
- consideration

From the assessment above, and as asserted by the 2nd respondent offer is present, by virtue of the letter of offer given by Dr. Sr. Wagure. Though the content was provided by the second respondent, the same is not tainted as observed by this court, earlier on that it left room for the addressee to reject or accept and also to make adjustments which they did. There was no evidence of any inducement, promise or compulsive words noted in the sample. There is also nothing present in the letter of offer evidencing the same. The acceptance exhibited, was in a standard form and there is nothing to show that it is tainted.

On performance, the 2nd respondent has exhibited documentation relied upon which have not been contradicted. The 2nd respondent has gone further and exhibited a letter of complaint leveled against him by the applicant annexed to his further replying affidavit as annexture DK G2 which the applicant have not denied authoring. In addition to the above, there has been no reply or rejoinder to the second respondents' assertion that work was done. The supporting affidavit to the OS, neither those deponed by counsel were categorical that work was not done. And if done, there is silence on their part as to who drew those plans, and supervised the work. There is therefore sufficient proof of performance.

As for the consideration, the 2nd respondent has asserted and exhibited documentation showing that the payment came from the applicant through one Dr. Sr. Prisca Wagure which have not been contradicted. It therefore follows that the arbitrator was right in ruling in the manner he did that there was privity of contract.

Question 4 deals with a determination as to whether on the basis of the facts so far presented, there is any claim before the arbitrator as envisaged under the provisions of the arbitration act of 1995. In response to this, it is on record that the court, has already noted that the second respondents' letter of acceptance incorporated the application of the provisions of Cap 525 Laws of Kenya which provisions vide the Fourth schedule vide Clause A7 permits, references of disputes arising from transaction undertaken under the Act to arbitration. A dispute arose because the 2nd respondent claimed that he had not been fully paid for the services rendered. A complaint, the applicant recognized and that is why they reported him to the relevant board for disciplinary action on mis conduct. The claim presented is based on the quantities provided for under the Act and as such the claim was a fit material for arbitration question 5 on the other hand deals with the question as to whether the applicant is entitled to such further orders and or directions as would entitled it to a fair and just determination of the issues raised. The business of the court, is to determine issues brought before it in a fair and just manner to both litigants. The issues presented to this court, were simply a determination as to whether:

(a). An arbitration agreement existed to warrant the matter being taken for arbitration before the, sole arbitrator.

(b). Whether there was privity of contract between the 2nd respondent and the applicant, in view of the alleged lack of authority from the applicant for Dr.,Sr. Prisca Wagura to so act on their behalf.

(c). Whether documents not executed under their seal can be relied upon to find liability against them.

The stand of this court, on these issues is that the applicant as well as the other litigants have received a fair and just determination of the issues raised by the applicant and as responded to by the respondents because:-

(a) It has given reasons as to why it has concurred with the sole arbitrators his ruling that there exists an arbitration agreement, in writing between the disputants sufficient enough to warrant the matter being referred to arbitration.

(b) It has given reasons as to why there is privity of contract between the 2nd respondent and the

applicant through Dr.Sr. Prisca Wagura.

(c) It has given reasons as to why the applicant cannot hide under the corporate trusteeship to escape being bound by the actions of Dr. Sr. Prisca Wagura in the transaction leading to these proceedings.

As for entitlement to directions, this is imperative due to the nature of the proceedings before court. They are not final in their nature. Directions will have to be given depending on the final out come of the cases as to whether proceedings commenced by way of arbitration proceedings are finally determined in these proceedings or the same are to be referred back to the arbitrator for final disposal.

Question 6 on the other hand deals with a question as to whether the applicant is entitled to costs, on the proceedings, before the arbitral tribunal as well as these proceedings. The courts' response to this is that its trite law that costs though within the discretion of the court, they usually follow the event. Where a party has earned costs in litigation the court, can only withhold the reasons with same given. Herein the applicant lost on their preliminary objection before the arbitral tribunal, but costs were ordered to be in the reference. If successful in these proceedings definitely will be ordered payable to the deserving party to both for these proceedings and the arbitral proceedings if the final result of these proceedings act as a final determination of the arbitral proceedings.

Before final orders are given herein, it is necessary to determine the issue as to whether the 1st respondent should have been joined to there proceedings or not. As submitted by counsel for the applicant, the section invoked by the applicant namely section 6 and 17 of the arbitration Act 1995, are silent as to whether in the event of a party participating in the proceedings before an arbitral tribunal, moving to the court, for an interim relief should or should not be joined to the court, proceedings. In this courts' opinion in view of the aforementioned silence, the applicant cannot be faulted in joining the 1st respondent to these proceedings. From the content of the interim application which sought stay, the sole purpose of bringing him into these proceedings was to fore stall the arbitration proceedings, pending the determination of the issues raised. The court, finds no fault on this move on the part of the applicant because had the first respondent been left out of these proceedings, nothing would have prevented the 1st respondent from proceeding with the arbitral proceedings to their logical conclusion, in terms of the provisions of section 6 (20 and 17 (8) of the arbitration Act. It was a justified, prudent act on the part of the applicant to forestall one set of proceedings to pave the way for one to be determined first so that the litigants do not end up having two decisions from two different tribunals either agreeing or disagreeing, which would then necessitate the filing of further proceedings or undertake further litigation to have one of them quashed. For this reason the applicant cannot be faulted for the action taken in bringing the 1st respondent into there interest.

The court, notes that it was argued on his behalf that he should not have been joined because he has no interest in the matter. Indeed he has no interest in the subject matter of the dispute. But he has an interest in the proceedings by virtue of the fact that he was the one seized with its disposal, and would have proceeded under the said sections, had they not been halted. In this court, view that is sufficient reasons to be joined to a proceeding.

In conclusion and for the reason given in the assessment the applicants' originating summons have been faulted for the following reasons:-

1. The court confirms the arbitrators finding on the existence of a written arbitration agreement because:-

(i). The principles of law established by legal texts set out herein, on determination of existence and non existence of an arbitration agreement recognize exchange of correspondence as a mode of such determination. Herein the sole arbitrator relied on the exchange of correspondence.

After due consideration this court also relies on the same because the hand written note, and commissioning letter, sample were confirming the unwritten discussion on the subject between the 2nd respondent and one Dr. Sr. Prisca Wagura. These two were followed by the commissioning letter from

Dr.Sr. Prisca Wagura and the acceptance letter of the 2nd respondent accepting that commission. In the acceptance letter the 2nd respondent indicated clearly that the terms applicable to the contract or transaction were those stipulated in the architects and quantity surveyor Act cap 525. which fact one Dr. Sr. Prisca Wagura did not object to accept. By virtue of that no objection, the provisions of the said Act on dispute resolution namely clause A6 and A7 of the fourth schedule were ushered in. This ushering in meant that either both parties opted for an amicable settlement of the dispute under clause A6, failing which either of them could invoke the procedure under clause A.7 and that is what the 2nd respondent did. The said correspondence therefore satisfy the ingredient for the existence of an arbitration agreement in writing.

(2) As regards privity of contract, the applicants denial of existence of the same was based on the arguments that the transaction was not undertaken by the applicants trustees in their corporate capacity in the first instance. And in the second instance that the documents relied upon by the 2nd respondent do not bear their seal as required by the trust deed, and as such they do not bind the applicant. The sole arbitrator disallowed that contention, in his ruling on a preliminary objection. This court confirms that finding because:-

(i). The trust deed does not contain the organizational structure of the applicant. It goes a head to recognize the existence of the applicants' constitution. It is therefore the applicants constitution which would have ruled out existence of a power to delegate duties by the trustees to other stakeholders of the applicant.

(ii). The trust deed states clearly that instruments which require sealing are those which require to be endorsed by two trustees. Once again the applicants constitution would have shed light on what instruments must be sealed, and what instruments do not require sealing and if they do not require sealing, then how these are to be authoriticated. In the absence of exhibition of such provision of the applicants constitution, the 2nd respondents assertion that rubber stamping is a mode of authoriticating can not be ruled out.

(iii). The supporting affidavit to the summons is silent about Dr. Sr. Prisca Wagura. There is no denial that she is not a member of the congregation, neither is there an assertion that she was an impostor.

(iv). There is also no denial that work was executed on behalf of the applicant by the 2nd respondent and other consultants evidenced by their letter of complaint dated 22/05/2003 to the chairman Board of Registration of Architects and quantity surveyors which letter the applicants failed to comment on.

(v). The 2nd respondent has displayed in his replying affidavit documentation right from the initiation of the transaction up to the start of the dispute, which the applicant chose not to controvert or rejoined on. In terms of the provision of order VI rule 9 (11) CPR they are to be deemed to admit the said facts. The said documentation have portrayed one Dr. Sr. Prisca Wagura as the chief executive of the transaction. In the absence of a disourning of those of this activities and in the absence of exhibition of a constitution demonstrating that delegation of duties by the trustees is not allowed, and in the absence of an explanation as to why the said Dr. Sr. Prisca was not made a party to the proceedings, or an affidavit sourced from her to explain how she came to purport to bind the applicant without its knowledge, and or consent, there is no material placed before this court by the applicant to oust the 2nd respondents objection that one Dr. Sr. Prisca Wagura was the applicants agent.

(vi). There are documents exhibited by the 2nd respondent evidencing part payment for work done. The 2nd respondent asserted that these payments were made by the applicants through one Dr. Sr. Prisca Wagura. Once again in the absence of the applicants denying through their deponement that these payments never came from them or if paid from their finance' they were irregular payments which deponement has not been made. Likewise in the absence of a deponement from Dr. Sr. Prisca Wagura that the applicants were not the source of these payments, there is nothing to oust the 2nd respondents' assertion that funds came from the applicants as part payments' and the balance of the claim is what has

been taken for arbitration. Therefore the scenario demonstrated above in i,ii,iii,iv,v and vii go to satisfy the elements for the formation of a contract namely offer, acceptance, performance and part consideration on this account the sole arbitrator was right in ruling that existence of a contract had been proved.

(3) as regard the authority of one Dr. Sr. Prisca Wagura to act for a body corporate, with a seal, section 3(13) of the trustees perpetual succession Act cap 164 laws of Kenya only makes it mandatory for the trustees to sue and be sued in their trust ship name. It does not rule out the existence of a constitution of such corporate bodies, with organizational structures, with powers to delegate and creation of agencies, within it. Once in the absence of the exhibition of the applicants constitution, the claim by them that Dr. Sr. Wagura had no mandate to act in the manner she did, without bringing her on board as one of the respondents herein, coupled with failure to solicit an affidavit from her as to why she acted the way she did, to bind them, without authority, there is nothing to oust the 2nd respondents assertion that she was their agent.

(ii) failure to bring her on board can only lead to a reasonable inference that had she been brought on board her evidence would have been adverse to the interests of the applicants, and since they were in a better position to avail her, and her testimony that inference has to be contrived against them.

(4) the court having ruled that a contract existed between the parties whereby offer was made by the applicants, agent, accepted by the 2nd respondent, work performed and partly paid for, and a dispute having arisen between the parties, and the 2nd respondent having availed himself of one of the mode of dispute resolution modes under the relevant Act, and him 2nd respondent having charged fees according to the schedule in the Act, the court finds that there is a valid claim before the Arbitrator capable of being arbitrated upon. The success of which will depend on the evidence adduced before the arbitrator by both sides.

(iii) The provision of the arbitration Act 1995 were properly invoked because cap 525 which govern the dispute does not have an inbuilt arbitration mechanism in it.

(5) The directions to be given here are that in view of this courts findings in number 1,2,3 and 4 above, the matter is a fit material for arbitration and parties are directed to resume the process before the sole arbitrator.

(6) The 1st respondent was not misjoined to these proceedings because section 6 and 17 of the arbitration Act 1995, does not rule out such joinder. The applicant cannot therefore be faulted for the said joinder. Further it was a prudent way of dealing with the matter to avoid having a situation where by parties would end up with 2 opposing decisions on the matter which would have necessitated further litigation to correct the situation. The procedure adopted of raising objection before arbitrator first, having a ruling on the same, filing of the originating summon and then have it ruled upon by the court before being directed to resume the arbitration proceedings was proper.

(7) The order on cost as pronounced by the arbitrator his ruling on the preliminary objection before him is confirmed.

(8) The applicants will however pay costs to the respondents of these proceedings.

DATED, READ AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2008.

R.N. NAMBYE

JUDGE